Metro Charm Sdn Bhd v Lee Nyan Hon & Brothers Sdn Bhd & Anor

HIGH COURT (IPOH) — SIVIL SUIT NO 22–76 OF 2001
JAMES FOONG J
21 MAY 2007

Banking — Cheque — Payment of cheque — Sufficient funds in account when cheque was issued but not when cheque was presented for payment — Whether presentation for payment was within reasonable time — Bills of Exchange Act 1949 s 55(1)(a)

Landlord and Tenant — Creation — Tenancy — Agreement — Whether agreement void for non fulfillment of conditions for construction and business licence approvals — Whether conditions were just covenants and not condition precedents — Whether unlawful objective in tenancy agreement — Whether objective of agreement had become impossible or unlawful to carry out after agreement came into existence

Landlord and Tenant — Determination — Breach by tenant — Payment of rental after date stipulated in tenancy agreement — Whether termination was valid

Landlord and Tenant — Determination — Trespass — Self help by landlord to recover property from occupier — Damages to be awarded — Specific Relief Act 1950 s 7(2) & (3)

The first defendant was the owner of a piece of land of approximately 7 acres in the Mukim of Hulu Kinta, Perak ('the land'). The second defendant was a director of the first defendant who was authorized to deal with the land. On 16 November 2000, the second defendant issued a letter for and on behalf of the first defendant to one Lee Soon Tuan, a promoter of a company to be incorporated, agreeing to let the land for an entertainment outlet. It was agreed that this arrangement was to be formalized by a written tenancy agreement between the company to be incorporated and the first defendant, and pending the execution of this written tenancy agreement, the tenant was allowed to take possession of the land provided that the tenant shall apply 'to the relevant authorities for the necessary licences for the operation of the entertainment outlet and the erection of structures'. The plaintiff was subsequently recognized by the first defendant as the tenant of the land. Soon after this letter of 16 November 2000, Lee Soon Tuan wasted no time in securing the relevant licences to operate the entertainment outlet, inter alia an application to Majlis Bandaraya Ipoh ('MBI') to operate restaurants and cafes on the land ('the business licence'), where some conditions were attached. On 28 February 2001, a plaintiff's cheque signed by the second defendant and one other director of the plaintiff for a sum of RM3,500 was

A presented to the first defendant for payment of rental for the month of February 2001. Accepting this rental for and on behalf of the first defendant was the second defendant. But this cheque was not presented by the first defendant to the plaintiff's bank for payment until 17 March 2001. By which time there were insufficient funds in the plaintiff's account to meet this payment resulting in this cheque being B dishonoured. Using this as the reason for non-payment of the monthly rental to the land, the first defendant, by letter dated 19 March 2001 to the plaintiff, terminated the tenancy agreement. They declared that by virtue of cl 7.1(a) of the agreement, the first defendant were entitled to terminate the tenancy agreement if the monthly rental or any part thereof shall remain unpaid for a period of 14 days after the same shall have became due and payable, ie by 1 March 2001. Upon receipt of this letter, the C plaintiff's employee immediately proceeded to the first defendant's office to tender a sum of RM3,500. But the first defendant refused to accept it. On the very next day, 28 March 2001, the plaintiff made another attempt to pay the rent. But this was again rejected by the first defendant who insisted that the tenancy to the land had been terminated.

D On 28 March 2001, the first defendant sealed off the land and posted security guards there to prevent the plaintiff, its servants and/or its agents from entering. Shortly thereafter, the first defendant tore down and flattened all structures on the land with cranes and bulldozers. As a result of this, the plaintiff brought this action against the first defendant for breach of contract and trespass, and against the second E defendant for breach of fiduciary duty as a director of the plaintiff and for inducing the first defendant to breach its tenancy agreement with the plaintiff.

The issues were: (1) was the first defendant in breach of the tenancy agreement by terminating the tenancy of the plaintiff to the land; (2) if the answer to issue (1) is in the positive, was the first defendant entitled to evict the plaintiff forcefully and F demolish all structures on the land; (3) if the answer to issue (1) is in the negative and to issue (2) is in the positive, then was the plaintiff entitled to the reliefs sought against the first defendant; (4) did the second defendant induce the first defendant to breach the tenancy agreement; (5) was there a fiduciary duty owed by the second defendant to the plaintiff and if there was, did the second defendant breach this duty; G (6) if the answer to either issues (4) and (5) is in the positive, would the plaintiff be entitled to the reliefs sought; and (7) was the first defendant entitled to counterclaim the plaintiff.

H **Held:**

(1) The cheque for payment of February 2001 rental was issued and handed over to the second defendant for onward transmission to the first defendant on 28 February 2001. At that point of time, rental for the month of February I 2001 was already due since it had to be paid by the 15th day of each month. However, despite this delay, the first defendant accepted it. But when the cheque for this payment was dishonoured on the 17 March 2001, rental for the month of February 2001 was already outstanding for more than 14 days (from due date 15 February 2001). So under cl 7.1(a) of the tenancy agreement, the first defendant was legally entitled to terminate the tenancy

agreement by notice in writing. By this deduction, the first defendant was within its legal right to terminate the plaintiff's tenancy (see para 21).

(2) Though the purported payment of rental was carried out on 28 February 2001, which was just before the 14-day grace period prior to the landlord's right to terminate the tenancy by virtue of cl 7.1(a) of the tenancy agreement, it was not made good by the dishonoured cheque. The law requires the drawer of a cheque to honour his cheque (see s 55(1)(a) of the Bills of Exchange Act 1949) and this implies that he should have sufficient funds in his bank account to do so. It is useless for a drawer of a cheque to claim that he had funds in his bank account at the time when he issued the cheque but not when it was presented for payment. A holder of a cheque has every right to present it for payment within reasonable time and expects it to be honoured. The plaintiff's cheque was presented by the first defendant for payment about 15 days after it was drawn and tendered. Considering the necessary administrative duties in the light and scope of the first defendant's business that were required to be carried out, the time taken by the first defendant in presenting the plaintiff's cheque for payment was not unreasonable. Since there was no payment of rental within the time stipulated in the tenancy agreement, the first defendant had a legitimate right to terminate the plaintiff tenancy under cl 7.1 of the tenancy agreement (see para 23).

(3) Regarding the claim that the tenancy agreement was void for non fulfillment of two conditions precedent ie, the approval for the construction of the structures on the land, and approval for the business licence to be secured by the plaintiff prior to the commencement of the tenancy. The tenancy agreement was not dependent on these covenants to exist nor did it depend on any of the events alleged by the first defendant to be conditions precedent. And if the plaintiff had breached any of the stipulated covenants, the first defendant, as landlord, was entitled under the terms of the tenancy agreement to seek remedy against the plaintiff, such as terminating the tenancy agreement. But this did not make the tenancy agreement void. There was also no unlawful objective in the tenancy agreement (see paras 30–31).

(4) To secure the relevant approval for the structures constructed and to use the structures for an intended purpose were not the primary objectives of the contract; the renting of the land was. Therefore, the argument of the first defendant that the objective of the agreement had become impossible or unlawful to carry out after the tenancy agreement came into existence was without merit (see para 32).

(5) Section 7(2) and (3) of the Specific Relief Act 1950 has regulated the remedy of self help into oblivion as the owner of the land can only seek to enforce his right to recover his property from the occupier, even after the tenancy has terminated, by way of a court action. As the first defendant in this case had not adopted this approach but instead enforced its rights by self help, the second issue was in the negative (see para 33).

(6) Since trespass is actionable per se, it is not necessary for the plaintiff to prove actual loss in order to recover damages from the first defendant. However, if actual loss is suffered and proved then the plaintiff should be duly

compensated. And this should be for a 'sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation'. For issue (3), the court awarded the sum of RM944,228.84 to the plaintiff as damages for trespass (see paras 37 & 45).

(7) The court was not inclined to find that the second defendant had directly or indirectly interfered with the use by unlawful means to induce the first defendant to breach the tenancy agreement. Though the second defendant was also a director of the first defendant at the material time, nevertheless from the evidence adduced, the court could not detect that he had intentionally induced the first defendant to delay in banking in the cheque. The time taken to present the plaintiff's cheque was due largely to the administrative work undertaken by the first defendant's staff. Therefore, the answer to the first part of issue (5) was in the negative. With this answer, the second part and issue (6) became irrelevant (see paras 48 & 56).

(8) The cause of action of the first defendant's counterclaim was for breach of contract. This was gathered from its pleadings particularly in the claim for special damages which could only arise from a term of the tenancy agreement where the plaintiff had to make good the land upon termination of the tenancy. But the plaintiff was not accorded an opportunity to do so. Before anything could be done, the first defendant had jumped the gun and demolished all that was on the land except, perhaps, the power substation. Under such circumstances, the counterclaim of the first defendant could not be sustained since it was tainted with illegality (see para 58).

[Bahasa Malaysia summary

Defendan pertama adalah pemilik sebidang tanah yang berkeluasan lebih kurang 7 ekar di Mukim Hulu Kinta, Perak ('harta tanah'). Defendan kedua adalah seorang pengarah kepada defendan pertama yang diberikan kuasa untuk berurusan dengan harta tanah tersebut. Pada 16 November 2000, defendan kedua mengeluarkan sepucuk surat bagi pihak defendan pertama kepada seseorang bernama Lee Soon Tuan, seorang seorang penaja sesebuah syarikat yang akan digabungkan, bersetuju untuk menyewakan harta tanah untuk saluran keluat hiburan. Adalah dipersetujui bahawa urusan ini akan diformalkan secara perjanjian penyewaan yang bertulis di antara syarikat yang akan digabungkan dan defendan pertama, dan sementara perlaksanaan perjanjian penyewaan bertulis ini, penyewa telah dibenarkan untuk mengambil milikan harta tanah jika penyewa perlu memohon 'kepada pihak berkuasa yang berkaitan untuk lesen yang perlu bagi operasi saluran keluar hiburan dan pembinaan struktur. Plaintif kemudiannya diiktiraf oleh defendan pertama sebagai penyewa harta tanah tersebut. Tidak lama selepas surat 16 November 2000, Lee Soon Tuan tidak membuang masa dalam memastikan lesen-lesen yang berkaitan untuk menjalankan kegiatan saluran keluar hiburan, antara lain permohonan kepada Majlis Bandaraya Ipoh ('MBI') untuk menjalankan kegiatan restoran dan kafe di harta tanah tersebut ('lesen perniagaan'), yang mana beberapa syarat disertakan. Pada 28 Februari 2001, cek plaintif yang ditandatangani oleh defendan kedua dan seorang lagi pengarah plaintif untuk jumlah RM3,500 telah diserahkan kepada

defendan pertama untuk bayaran sewa bagi bulan Februari 2001. Penerimaan sewaan untuk dan bagi pihak defendan pertama adalah defendan kedua. Tetapi cek tersebut tidak diserahkan oleh defendan pertama kepada bank plaintif untuk pembayaran sehingga 17 Mac 2001. Sehingga ketika itu terdapatnya kekurangan dana di dalam akaun plaintif untuk pembayaran yang menyebabkan cek tersebut tidak laku. Menggunakan perkara ini sebagai sebab bagi tiada pembayaran sewaan bulanan harta tanah tersebut, defendan pertama, melalui surat bertarikh 19 Mac 2001 kepada plaintif, menamatkan perjanjian penyewaan. Mereka menyatakan bahawa menurut klausa 7.1(a) perjanjian tersebut, defendan pertama adalah berhak untuk menamatkan perjanjian penyewaan jika sewa bulanan atau mana-mana bahagian daripadanya kekal tidak berbayar untuk tempoh 14 hari selepas itu akan menjadi tertunggak dan perlu dibayar, iaitu sebelum 1 Mac 2001. Apabila menerima surat tersebut, pekerja plaintif dengan segera terus ke pejabat defendan pertama untuk mengemukakan RM3,500. Tetapi defendan pertama enggan menerimanya. Pada keesokan harinya, 28 Mac 2001, plaintif telah melakukan sekali lagi cubaan untuk membayar sewa. Tetapi sekali lagi ditolak oleh defendan pertama yang berkeras bahawa penyewaan harta tanah tersebut perlu ditamatkan.

Pada 28 Mac 2001, defendan pertama menutup harta tanah tersebut dan menempatkan pengawal keselamatan di sana untuk menghalang plaintif, pekerjanya dan/atau ejennya daripada masuk. Berikutan itu, defendan pertama telah merobohkan dan meranapkan kesemua struktur di atas harta tanah tersebut dengan kren dan jentolak. Disebabkan perkara ini, plaintif membawa tindakan ini terhadap defendan pertama untuk kemungkiran kontrak dan pencerobohan, dan terhadap defendan kedua untuk kewajipan fidusiari sebagai seorang pengarah plaintif dan bagi mendorong defendan pertama untuk memungkiri perjanjian penyewaannya dengan plaintif.

Isu-isu adalah: (1) adakah defendan pertama memungkiri perjanjian penyewaan dengan menamatkan penyewaan plaintif terhadap harta tanah tersebut; (2) jika jawapan kepada isu (1) adalah positif, adakah defendan berhak untuk mengusir plaintif dengan tegasnya dan merobohkan kesemua struktur di atas harta tanah tersebut; (3) jika jawapan kepada isu (1) adalah negatif dan isu (2) adalah positif, adakah plaintif berhak mendapatkan relif yang diminta terhadap defendan pertama; (4) adakah defendan kedua mendorong defendan pertama untuk memungkiri perjanjian penyewaan; (5) adakah terdapatnya kewajipan fidusiari yang terhutang oleh defendan kedua kepada plaintif dan jika ada, adakah defendan kedua memungkiri kewajipannya; (6) jika jawapannya kepada kedua-dua isu (4) dan (5) adalah positif, adakah plaintif berhak kepada relif-relif yang dipohon; dan (7) adakah defendan pertama berhak kepada tuntutan balas kepada plaintif.

Diputuskan:

(1) Cek untuk bayaran sewaan Februari 2001 telah dikeluarkan dan diserahkan kepada defendan kedua untuk dihantar serahkan kepada defendan pertama pada 28 Februari 2001. Pada ketika itu, sewa bulan Februari 2001 sudah perlu dibayar semenjak ianya perlu dibayar pada hari ke 15 setiap bulan. Tetapi, walaupun ada kelewatan, defendan pertama menerimanya. Tetapi apabila cek untuk pembayaran ini tidak laku pada 17 Mac 2001, sewaan

untuk bulan Februari 2001 telah pun tertunggak lebih daripada 14 hari (daripada tarikh perlu bayar 15 Februari 2001). Oleh itu di bawah klausa 7.1(a) perjanjian penyewaan, defendan pertama adalah secara sahnya berhak untuk menamatkan perjanjian penyewaan melalui notis secara bertulis. Melalui kesimpulan ini, defendan pertama adalah di dalam hak undang-undang untuk menamatkan penyewaan plaintif (lihat perenggan 21).

(2) Melalui pembayaran sewaan yang dimaksudkan telah dilakukan pada 28 Februari 2001, yang mana hanya sebelum 14 hari tempoh tangguh sebelum hak tuan tanah untuk menamatkan penyewaan menurut klausa 7.1(a) perjanjian penyewaan, ianya tidak dalam keadaan baik dengan cek tidak laku. Undang-undang memerlukan penyuruh bayar cek untuk melunaskan ceknya (lihat s 55 Akta Bil Pertukaran 1949) dan ini membayangkan bahawa beliau perlu mempunyai dana yang mencukupi dalam akaun banknya untuk melakukannya. Ini adalah tidak berguna bagi penyuruh bayar cek untuk menyatakan bahawa beliau mempunyai dana yang mencukupi dalam akaun banknya pada masa beliau mengeluarkan cek tetapi tidak apabila ianya dikemukakan untuk pembayaran. Pemegang cek mempunyai hak untuk mengemukakannya untuk pembayaran dalam tempoh masa yang munasabah dan mengharapkannya laku. Cek plaintif telah dikemukakan oleh defendan pertama untuk pembayaran lebih kurang 15 hari selepas ianya dikeluarkan dan dikemukakan. Mengambil kira tugas pentadbiran yang penting dalam keadaan dan skop perniagaan defendan pertama bahawa yang perlu dilakukan, masa yang diambil oleh defendan pertama dalam mengemukakan cek plaintif untuk pembayaran bukanlah tidak munasabah. Oleh kerana tidak terdapat pembayaran penyewaan dalam tempoh masa yang ditetapkan di dalam perjanjian penyewaan, defendan pertama mempunyai hak yang sah untuk menamatkan penyewaan plaintif di bawah klausa 7.1 perjanjian penyewaan (lihat perenggan 23).

(3) Berkenaan dakwaan bahawa perjanjian penyewaan adalah terbatal kerana tidak memenuhi dua syarat terdahulu iaitu, kelulusan untuk pembinaan struktur di atas harta tanah, dan kelulusan untuk lesen perniagaan yang perlu diperolehi oleh plaintif sebelum bermulanya penyewaan. Perjanjian penyewaan tidak bergantung kepada waad ini untuk wujud atau ianya bergantung kepada apa-apa keadaan yang didakwa oleh defendan pertama sebagai syarat terdahulu. Dan jika plaintif telah memungkiri mana-mana waad yang dinyatakan, defendan pertama, sebagai tuan tanah, adalah berhak di bawah terma-terma perjanjian penyewaan untuk mendapatkan remedi terhadap plaintif, seperti menamatkan perjanjian penyewaan. Tetapi ini tidak membuatkan perjanjian penyewaan terbatal. Tidak terdapat juga objektif yang tidak sah di dalam perjanjian penyewaan (lihat perenggan 30–31).

(4) Untuk mendapatkan kelulusan yang berkenaan untuk struktur dibina dan untuk menggunakan struktur bagi tujuan yang diingini adalah bukannya objektif utama kontrak; ianya adalah sewaan harta tanah. Oleh itu pernyataan defendan pertama bahawa objektif perjanjian menjadi mustahil atau tidak sah untuk dilaksanakan selepas perjanjian penyewaan diwujudkan tanpa merit (lihat perenggan 32).

(5) Seksyen 7(2) dan (3) Akta Relif Spesifik 1950 telah menyelaraskan remedi untuk bantuan sendiri tanpa disedari sebagai pemilik tanah hanya boleh memohon untuk menguatkuasakan haknya untuk mendapatkan kembali hartanya daripada penghuni, walaupun selepas penyewaan ditamatkan, melalui tindakan mahkamah. Sebagai defendan pertama di dalam kes ini tidak menggunakan pendekatan ini tetapi sebaliknya menguatkuasakan hak-haknya melalui bantuan sendiri, isu kedua adalah di dalam keadaan negatif (lihat perenggan 33).

(6) Disebabkan pencerobohan adalah boleh didakwa secara sendiri, ianya tidak perlu untuk plaintif untuk membuktikan kerugian sebenar dalam mendapatkan ganti rugi daripada defendan pertama. Tetapi, jika kerugian sebenar ditanggung dan dibuktikan maka plaintif perlulah diberi pampasan. Dan ini seharusnya adalah ' jumlah wang yang meletakkan pihak yang cedera, atau sesiapa yang terjejas, dalam posisi yang sama seperti beliau mengalaminya jika beliau tidak mengekalkan kesilapan bagi beliau mendapatkan pampasannya'. Untuk isu (3), mahkamah mengawardkan sejumlah RM944,228.82 kepada plaintif sebagai gantirugi bagi pencerobohan (lihat perenggan 37 & 45).

(7) Mahkamah tidak cenderung untuk mendapati bahawa defendan kedua telah secara langsung atau tidak langsung campur tangan dengan menggunakan cara tidak sah untuk mendorong defendan pertama untuk memungkiri perjanjian penyewaan. Walaupun defendan kedua juga adalah seorang pengarah defendan pertama pada masa yang material, walau bagaimanapun, daripada bukti yang dikemukakan, mahkamah tidak dapat mengesan bahawa beliau telah dengan sengaja mendorong defendan pertama untuk lewat memasukkan cek. Masa yang diambil untuk mengemukakan cek plaintif adalah disebabkan kerja pentadbiran yang dilakukan oleh kakitangan defendan pertama. Oleh itu, jawapan kepada bahagian pertama isu (5) adalah negatif. Dengan jawapan ini, bahagian kedua isu (6) menjadi tidak relevan (lihat perenggan 48 & 56).

(8) Kausa tindakan tuntutan balas defendan pertama adalah kemungkiran kontrak. Ini dihimpunkan daripada plidingnya terutamanya di dalam tuntutan untuk ganti rugi khas yang hanya ditimbulkan daripada terma perjanjian penyewaan. Tetapi plaintif tidak diberikan peluang untuk melakukannya. Sebelum apa-apa dilakukan, defendan pertama telah bertindak sebelum masanya dan memusnahkan kesemua di atas harta tanah kecuali mungkin pencawang kuasa. Di bawah keadaan ini, tuntutan balas defendan pertama tidak boleh kekal kerana ia merupakan tindakan menyalahi undang-undang (lihat perenggan 58).]

Notes

For cases on payment of cheque, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2044–2046.
For cases on tenancy, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 835–839.
For a case on breach by tenant, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) para 853.
For cases on trespass, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1003–1004.

Cases referred to

Chua Boon Chin v JM McCormack & Ors [1979] 2 MLJ 156 (refd)
Dr Harjit Singh v Suhaimi bin Samat & Anor [1995] 2 AMR 1988 (refd)

Er Eng Hong & Anor v New Kim Eng dan tiap-tiap pemegang yang menduduki atas sebahagian tanah yang dikenali sebagai HS (M)2162 PTD 4403 Mukim Benut, Daerah Pontian [2000] 1 CLJ 289 (refd)
Livingstone v Rawyardr Coal Co [1880] 5 App Cas 25 (refd)
Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105 (refd)
Nur-lslam Wordwide Industries Sdn Bhd v Yee Kok Sum [2001] 7 CLJ 494 (refd)
Rookes v Barnard [1964] 1 All ER 367 (refd)
Sime Engineering Sdn Bhd & Anor v Public Bank Bhd [2004] 7 MLJ 475 (refd)
SME Aerospace Sdn Bhd v Steyr Mannlicher (M) Sdn Bhd [2006] 3 MLJ 462 (refd)

Legislation referred to
Bills of Exchange Act 1949 ss 55(1)(a), 74(b)
Contracts Act 1950 ss 24, 33, 57(2)
National Land Code s 235
Specific Relief Act 1950 ss 7, 8

V Vijaya Segaran (Maxwell, Kenion, Cowdy & Jones) bagi pihak plaintif
V Sithambaram (Kumar & Co) bagi pihak defendan pertama
Chan Kok Keong (Norazali Nordin with him) (Chan & Associates) bagi pihak defendan kedua

James Foong J:

INTRODUCTION

[1] [1] The first defendant, a family owned company, is the owner of a piece of land of approximately seven acres and held under HS(D) KA 81943 for lot PT 162011 in the Mukim of Hulu Kinta, Perak (the said land). It is strategically located in Ipoh where there is a hyper market known as Jaya Jusco right opposite. The second defendant is a director of the first defendant who was authorized to deal with the said land. On 16 November 2000, the second defendant issued a letter for and on behalf of the first defendant to one Lee Soon Tuan, a promoter of a company to be incorporated, agreeing to let the said land for an entertainment outlet. It was agreed that this arrangement was to be formalized by a written tenancy agreement between the company to be incorporated and the first defendant, and pending the execution of this written tenancy agreement, the tenant was allowed to take possession of the said land provided that the tenant shall apply 'to the relevant authorities for the necessary licences for the operation of the entertainment outlet and the erection of structures'. The plaintiff was subsequently recognized by the first defendant as the tenant of the said land. Soon after this letter of 16 November 2000, Lee Soon Tuan wasted no time in securing the relevant licences to operate the entertainment outlet. This included an application to the District Office for permission to operate a public house and to sell liquor therein, an application to the Custom Department for permission to provide taxable services and, application to Majlis Bandaraya Ipoh (MBI) to operate restaurants and cafes on the said land. The last is commonly known as the 'business licence'. From evidence adduced, all such licences were secured except for the last which had conditions attached. MBI's letter dated 15 January 2001 stated it in this manner:

PERMOHONAN UNTUK KELULUSAN PELAN PEMBANGUNAN RESTORAN DAN KAFE Dl ATAS PLOT 162011, JALAN TEH LEAN SWEE, 30350 IPOH, PERAK DARUL RIDZUAN

Adalah saya dengan segala hormatnya merujuk surat tuan bertarikh 7 Disember 2000 mengenai perkara di atas dan dimaklumkan bahawa Jawatankuasa yang bermesyuarat pada 21 Disember 2000 pada dasarnya telah meluluskan cadangan tersebut tertakluk kepada mematuhi syarat-syarat berikut:

(i) Mengemukakan semula pelan pembangunan dan kertas konsep projek berkenaan kepada Majlis Bandaraya Ipoh sebelum memulakan pembangunan;

(ii) Menjelaskan yuran pelan sebanyak 20 kali ganda mengikut Akta Jalan, Parit dan Bangunan (Undang-Undang Kecil Bangunan Seragam) kerana telah memulakan pembangunan tanpa mendapat kelulusan pelan terlebih dahulu;

(iii) Mematuhi syarat-syarat Perlesenan, Jabatan Kesihatan, Majlis Bandaraya Ipoh;

(iv) Menyediakan 'Buffer' dengan skim perumahan bersebelahan;

(v) Jalan keluar - masuk hendaklah melalui Jalan Teh Lean Swee dan tidak ke Jalan Chan Chee Keong;

(vi) Posisi tanda hendaklah mengikut nasihat Majlis.

2. Bersama-sama ini dikembalikan sejumlah 10 salinan pelan susunatur untuk dibuat pindaan untuk tindakan pihak tuan selanjutnya.

(AZIZUDDIN BIN HAJI ALIAS, AMP, PPT, APPM)

Pengarah Perancang Bandaraya

bp Datuk Bandar Ipoh

[2] Aside from applying for these licences, the plaintiff also proceeded to construct structures on the said land. Once these were completed, the plaintiff began to operate the entertainment outlet thereon.

[3] Having an interest in this plaintiffs venture, the second defendant invested a sum of RM100,000 in the plaintiff. But shares in the plaintiff were not issued to him. Instead, he was made a director together with Lee Soon Tuan and one Lee Gim Aik, who were the were the principal shareholders of the plaintiff. Though the second defendant was one of the three directors of the plaintiff, he was made a compulsory signatory of all cheques and banking documents of the plaintiff.

[4] On 5 February 2001, a formal written tenancy agreement for the said land was entered into between the first defendant and the plaintiff. It was for a period of three years commencing from 15 December 2000 with a monthly rental 'to be determined by the number of sub-tenants the Tenant has on the said land SUBJECT TO a maximum sum of RM21,000 per month ('the maximum rent'). The initial rental whether or not there are sub-tenants shall be RM3,500 per month ('the initial rent') and shall be payable monthly in advance on the fifth day of each and every

succeeding month. The rental shall be increased by a sum of RM3,500 each time the tenant obtains a sub-tenant until the maximum rent is achieved.

[5] Under cl 5.1 of the agreement, the 'tenant shall duly and punctually pay the monthly rental, utilities and other charges (if any) payable under this agreement...'

[6] And under cl 5.5 of the agreement the plaintiff covenanted that the 'tenant shall comply with all statutes, ordinances or regulations present or future affecting or relating to the use of the said land and the erection of structures and shall comply with all requirements which may be given by any authority having jurisdiction or authority over or in respect of the said land...'.

[7] Then under cl 5.9 of the agreement it is stipulated that the 'tenant shall not use the said land for any unlawful purpose and shall not do or permit to be done any act or thing which may become a nuisance or give reasonable cause for complaint from building/portion adjoining the said land'.

[8] And in the event of default or breach of these conditions, cl 7 of the agreement provides:

DEFAULT AND TERMINATION

7.1. The landlord and the tenant hereby agree that:

(a) if the monthly rental hereby reserved or any part thereof shall remain unpaid for a period of fourteen days after the same shall have become due and payable in accordance with the covenants for payment herein contained; or

(b) if the tenant commits, permits or suffers to occur any breach or default in the due and punctual observance and performance of any of the covenants, obligations and provisions of this agreement after the landlord has given fourteen days notice in writing to the tenant to rectify such breach or default; or...

Then in any one or more of such events, the landlord shall at any time thereafter be entitled to terminate this agreement by notice in writing to the tenant and forfeit the security deposit paid hereunder but without prejudice to any action or other remedy which the landlord has or might or otherwise could have for the recovery of damages or arrears...

7.3. In the event that the tenant continues to remain in occupation of the said land and fails to surrender or yield up unto the landlord the whole of the said land and every part thereof or fails to remove all its goods from the said land after the termination of the tenancy, the tenant shall be liable to pay to the landlord a sum equivalent to double the rental payable prior to the termination for the period between the date of termination and the date of actual delivery of vacant possession PROVIDED ALWAYS THAT if the termination occurs in the first year of the tenancy but the tenant holds over to the second year of the tenancy, the tenant shall pay to the landlord double the maximum rent from the second year onwards until the date of actual delivery of vacant possession. Further, the landlord shall be entitled to re-possess the said land vide court proceedings under s 7(2) of the Specific Relief Act 1950. All cost and expenses incurred by the landlord in bringing an action for repossession shall be borne by the tenant, and the landlord may recover the same from the tenant forthwith.

[9] Arising from this tenancy, the following sums of monies were paid by the plaintiff to the first defendant:

(a) RM21,000 as security deposit;

(b) RM7,000 for rentals for the month of December 2000 and January 2001.

[10] On 28 February 2001, a plaintiffs cheque signed by the second defendant and one other director of the plaintiff for a sum of RM3,500 was presented to the first defendant for payment of rental for the month of February 2001. Accepting this rental for and on behalf of the first defendant was the second defendant. But this cheque was not presented by the first defendant to the plaintiffs bank for payment until 17 March 2001. By which time there were insufficient funds in the plaintiffs account to meet this payment resulting in this cheque being dishonoured. Using this as the reason for non-payment of the monthly rental to the said land, the first defendant, through its solicitors Ms Chan & Associates, by letter dated 19 March 2001 to the plaintiff terminated the tenancy agreement. They declared that by virtue of 'cl 7.1(a) of the aforesaid agreement, our client is entitled to terminate the tenancy agreement if the monthly rental or any part thereof shall remain unpaid by your goodselves for a period of 14 days after the same shall have became due and payable to our client, ie, by 1 March 2001'.

[11] Upon receipt of this letter, the plaintiffs employee immediately proceeded to the first defendant's office to tender a sum of RM3,500. But the first defendant refused to accept it. On the very next day, 28 March 2001, the plaintiff made another attempt to pay the rent. This time, through its solicitors. But this was again rejected by the first defendant who insisted that the tenancy to the said land has been terminated.

[12] On 28 March 2001, the first defendant sealed off the said land and posted security guard there to prevent the plaintiff, its servants and/or its agents from entering. Shortly thereafter, the first defendant tore down and flattened all structures on the said land with cranes and bulldozers.

[13] As a result of this, the plaintiff brought this action against the first defendant for breach of contract and trespass, and against the second defendant for breach of fiduciary duty as a director of the plaintiff and for inducing the first defendant to breach its tenancy agreement with the plaintiff.

CLAIMS OF THE PLAINTIFF AGAINST THE DEFENDANTS

[14] Against the first defendant, the plaintiff prays for:

(1) a declaration that the tenancy agreement was wrongfully terminated by the first defendant;

(2) a declaration that the first defendant had wrongfully and unlawfully taken possession of the said land;

(3) a declaration that the plaintiff is entitled to a lease or tenancy of the said land for the remaining period of the tenancy with option to renew for another two years as is deemed appropriate from the date of re-possession by the first defendant;

(4) an injunction to restrain the first defendant and or its agents and or servants from selling, disposing, charging, leasing, parting with possession of the said land pending the outcome of this suit;

(5) cost and expenses involved in the reinstatement of the structures and buildings (together with contents) to its original state and condition or alternatively a sum of RMl,219,600 as special damages or such sum as deemed appropriate by the court;

(6) loss of profit from potential sub-tenants and income from billboards advertising at RM150,000 per month or such sum as deemed appropriate for the remaining period of the tenancy and its renewal calculated from the time when the first defendant re-possessed the said land;

(7) general damages for wrongful eviction and trespass;

(8) loss of profit at RM1,320,000 per year or such sum as the court deems fit to grant;

(9) loss of goodwill of the business estimated at RM500,000;

(10) exemplary and or aggravated damages;

(11) costs.

[15] Against the second defendant, the plaintiff prays for:

(1) general damages, exemplary and/or aggravated damages and costs.

DEFENCE & COUNTERCLAIM OF THE FIRST DEFENDANT

[16] The defences as pleaded by the first defendant are inter alia:

(1) the plaintiff was in breach of the tenancy agreement by failing to pay rent to the said land within the stipulated time;

(2) the plaintiff had failed to comply with laws and by-laws and the conditions imposed by MBI;

(3) the plaintiff had committed public nuisance by causing noise pollution to adjoining land owners;

(4) the first defendant was entitled to repossess the said land as landowner and to demolish illegal structures thereon; and

(5) that s 7(2) of the Specific Relief Act 1950 has no application to this claim of the plaintiff 'as building structure on the said land has been erected without proper planning permission and further the business licences had been revoked';

(6) that the 'illegal structure erected on the said land (are) without approved building plans from Majlis Perbandaran Ipoh exposed the first defendant to various offences and penalties as herein before stated that entitled the first defendant to re-take possession and restore the said land to its original condition'.

[17] Beside this defence, the first defendant counterclaimed the plaintiff for a sum of RM34,700 as special damages incurred for disconnecting electricity supply to the said land, demolition of the structures and filling up holes dug up for ponds thereon. Without really specifying the cause of action against the plaintiff in its counterclaim, the first defendant also prayed for general damages.

DEFENCE OF SECOND DEFENDANT

[18] The defences of the second defendant are basically these: that he was not the person in control of the financial, management and operational affairs of the plaintiff and thus owed no fiduciary duty to the plaintiff and neither did he induce the first defendant to breach its tenancy contract with the plaintiff.

ISSUES

[19] Arising from this set of facts, claims, defences and counterclaims, I am of the view that the issues of this case are as follow:

(1) Was the first defendant in breach of the tenancy agreement by terminating the tenancy of the plaintiff to the said land?

(2) If the answer to the first issue is in the positive, was the first defendant entitled to evict the plaintiff forcefully and demolish all structures on the said land?

(3) If the answer to issue (1) is in the negative and to issue (2) is in the positive, then is the plaintiff entitled to the reliefs sought against the first defendant?

(4) Did the second defendant induce the first defendant to breach the tenancy agreement?

(5) Was there a fiduciary duty owed by the second defendant to the plaintiff and if there was, did the second defendant breach this duty?

(6) If the answer to either issues (4) and (5) above is in the positive, would the plaintiff be entitled to the reliefs sought?

(7) Is the first defendant entitled to counterclaim the plaintiff?

ANALYSIS

First Issue: Was the first defendant in breach of the tenancy agreement by terminating the tenancy of the plaintiff?

[20] At the outset, I must stress that the letter of termination by the first defendant's solicitors to the plaintiff on 19 March 2001 gave only one reason for the

termination: that the monthly rental remained unpaid for 14 days after due date. So the starting point of my analysis is to determine whether this is true.

[21] It is common ground that the cheque for payment of February 2001 rental was issued and handed over to the second defendant for onward transmission to the first defendant on 28 February 2001. At that point of time, rental for the month of February 2001 was already due since it had to be paid by the 15 day of each month. However, despite this delay, the first defendant accepted it. But when the cheque for this payment was dishonoured on the 17 March 2001, rental for the month of February 2001 was already outstanding for more than 14 days (from due date 15 February 2001). So under cl 7.1(a) of the tenancy agreement, the first defendant was legally entitled to terminate the tenancy agreement by notice in writing. By this deduction, I hold that the first defendant was within its legal right to terminate the plaintiffs tenancy.

[22] But what the plaintiff is arguing is that at the time when the cheque for February 2001's rental was tendered to the first defendant on the 28 February 2001, there were sufficient funds in the plaintiffs bank account to honour it. Instead, the first defendant intentionally delayed in banking in this cheque until such funds were depleted. By such action, the plaintiff could not be considered as having defaulted in paying the February 2001's rental.

[23] In my opinion, this form of reasoning is totally untenable. The main question here is whether rental remained unpaid for a period of 14 days. The answer is definitely in the positive as can be gathered from the facts. Though the purported payment of rental was carried out on 28 February 2001, which was just before the 14 day grace period prior to the landlord's right to terminate the tenancy by virtue of cl 7.1(a) of the tenancy agreement, it was not made good by the dishonoured cheque. The law requires the drawer of a cheque to honour his cheque (see s 55(1)(a) of the Bills of Exchange Act 1949) and this implies that he should have sufficient funds in his bank account to do so. It is useless for a drawer of a cheque to claim that he had funds in his bank account at the time when he issued the cheque but not when it was presented for payment. Such reasoning, I find does not hold in law. A holder of a cheque has every right to present it for payment within reasonable time and expects it to be honoured. What is reasonable time depends on the facts of the case, see s 74(b) of the Bills of Exchange Act 1949. In our situation, the plaintiffs cheque was presented by the first defendant for payment about 15 days after it was drawn and tendered. This cheque was handed over to the first defendant's staff by the second defendant. The first defendant did not only own this said land nor depended on the rental therefrom as the only source of income. They were landed proprietors as well as being engaged in other form of business. So as they have explained, time was required to record daily takings from their businesses before such payments were presented to the various banks for payment. Considering such necessary administrative duties in the light and scope of the first defendant's of business that were required to be carried out, I am of the view that the time taken by the first defendant in presenting the plaintiffs cheque for payment is not unreasonable. It is also my view that instead of blaming the first defendant for the delay in presenting the said cheque for payment, the plaintiff should have been more vigilant in

monitoring its banking account to ensure that there were sufficient funds to meet payment of this cheque. Attributing this shortcoming to the second defendant who was said to have managed the financial affairs of the plaintiff is separate matter altogether which I shall be dealing with later. But as far as the first defendant is concerned, since there was no payment of rental within the time stipulated in the tenancy agreement, the first defendant had a legitimate right to terminate the plaintiff tenancy under cl 7.1 of the tenancy agreement.

[24] The first defendant has also accused the plaintiff for being in breach of cl 5.5 of the tenancy agreement in failing to comply with all statutes, ordinances or regulations present or future affecting or relating to the use of the said land. Essentially this complaint centers on the plaintiffs non compliance of the conditions set down by MBI for the issuance of the business licence. But having examined the evidence in detail, I cannot say that the plaintiff was in breach of this clause. MBI had in fact by its letter of 15 January 2001, 'telah meluluskan cadangan tersebut (of the plaintiff for the business licence) tertakluk kepada mematuhi syarat syarat berikut...' Though structures were erected on the said land prior to MBFs approval, nevertheless MBI seemed to have allowed these to remain and be utilized. This can be detected from one of the conditions set down by MBI in the above mentioned letter which says: 'Menjelaskan yuran pelan sebanyak 20 kali ganda mengikut Akta Jalan, Parit dan Bangunan (Undang-Undang Kecil Bangunan Seragam) kerana telah memulakan pembangunan tanpa mendapat kelulusan pelan terlebih dahulu'. If MBI had considered its regulations and rules to have been breached by the presence of these buildings in the absence of their approval, I would have expected them to immediately issue a demolition order for these rather than allow them to remain standing and be used. And this went on until 22 February 2001 when MBI requested that the plaintiff stop all its activities on the said land until the conditions imposed were complied with. But even then and up to 23 March 2001, the plaintiffs application for the business licence had not been rejected. All that MBI said in their letter of 23 March 2001 was that MBFs committee in charge of this matter had deferred the approval until the stated conditions were met. I agree with the plaintiffs explanation that it was the first defendant who prematurely prevented the plaintiff from fulfilling the conditions imposed by MBI by terminating the plaintiffs tenancy. But nevertheless even though the first defendant failed on this ground the termination of the plaintiffs tenancy is still lawful by reason that rent for the month of February 2001 was not paid within the stipulated time.

[25] The last ground raised by the first defendant to support its claim that the plaintiff has breached the tenancy agreement is that the plaintiff committed nuisance by causing noise pollution to nearby residents of the said land. I am afraid that except for a reminder by MBI in a letter to the plaintiff dated 15 February 2001 which referred to a complaint by nearby residents of high noise level there is no other evidence advanced by the first defendant during trial to positively prove that the plaintiff had actually 'used the said land for any unlawful purpose and shall not do or permit to be done any act or thing which may become a nuisance or give reasonable cause for complaint from building/portion adjoining the said land', taken from cl 5.9 of the tenancy agreement. To succeed in this allegation, it is my view that the first defendant must first prove that the plaintiff had used the said land for an

unlawful purpose. So the act or thing that gives rise to nuisance must be accompanied by the use of the said land for unlawful purpose. But here, I find no evidence that the plaintiff had used the said land for any unlawful purpose. The plaintiff had secured from the police licence to operate the said land as an entertainment centre, from the District Office permission to sell liquor and drinks, and from the Custom Department approval to provide taxable services. And even for the business licence, MBI had given their tacit approval, a matter which I elaborated earlier. I therefore find that this allegation of the first defendant unsustainable. In any event, this was not the ground given by the first defendant for terminating the tenancy agreement. This brings me to form the view that this assertion of nuisance was an afterthought.

[26] Before I conclude on this issue, I would like to touch on the claim by the plaintiff that the first defendant has also breached s 235 National Land Code (NLC) by notgiving the plaintiffsufficientnoticeto remedy th& breach. Section 235 reads:

> Notice before forfeiture
>
> Notwithstanding anything to the contrary contained therein, no person or body shall be entitled to enforce, by action or otherwise, the forfeiture of any lease, sub-lease or tenancy for breach of any of the provisions thereof unless and until that person or body has served on the lessee, sub-lessee or tenant for the time being a notice in writing —
>
> (a) specifying the particular breach complained of;
> (b) if the breach is capable of remedy, requiring him to remedy it, and
> (c) in any case other than non-payment of rent requiring him to make compensation in money for the breach,
>
> and the lessee, sub-lessee or tenant on whom the notice is served has failed, within a reasonable time thereafter, to remedy the breach (if it is capable of remedy) and to make reasonable compensation in money therefore to the satisfaction of that person or body.

[27] Without the necessity to dwell in the details of this with the facts of the case, all that I need to say is that I agree with the submission of the first defendant that this provision only applies to registered tenancy under the NLC. My view is supported by a commentary of Judith Sihombing in her celebrated book on *The National Land Code, A Commentary* where at para 3454 she said:

> This section applies to registered leases (s 221), registered subleases (s 222), and tenancies exempt from registration which have been endorsed on title (ss 213 and 316). The right to forfeit an unregistered lease depends on the existence of an express proviso for re-entry in the lease. This proviso should be expressed to be exercisable in the same circumstances as are contained in s 234: *Re Karuppiah* [1962] MLJ 389.

So on the first issue, my answer is in the positive.

Second Issue: Was the first defendant entitled to evict the plaintiff forcefully and demolish all structure on the said premises?

[28] Now that I have held that the tenancy has been legitimately terminated by the first defendant under cl 7.1(a) of the tenancy agreement, the next issue that has to

be dealt with is whether the first defendant was entitled to evict the plaintiff forcefully and demolish all structures on the said land. To consider this, it is necessary for me to repeat cl 7.3 of the tenancy agreement which says:

> In the event that the tenant continues to remain in occupation of the said land and fails to surrender or yield up unto the landlord the whole of the said land and every part thereof or fails to remove all its goods from the said land after the termination of the tenancy, the tenant shall be liable to pay to the landlord a sum equivalent to double the rental payable prior to the termination for the period between the date of termination and the date of actual delivery of vacant possession PROVIDED ALWAYS THAT if the termination occurs in the first year of the tenancy but the tenant holds over to the second year of the tenancy, the tenant shall pay to the landlord double the maximum rent from the second year onwards until the date of actual delivery of vacant possession. Further, the landlord shall be entitled to re-possess the said land vide court proceedings under s 7(2) of the Specific Relief Act 1950. All cost and expenses incurred by the landlord in bringing an action for repossession shall be borne by the tenant, and the landlord may recover the same from the tenant forthwith.

And s 7(2) of the Specific Relief Act 1950 demands:

> Recovery of specific immovable property
>
> Where a specific immovable property has been let under a tenancy, and that tenancy is determined or has come to an end, but the occupier continues to remain in occupation of the property or part thereof, the person entitled to the possession of the property shall not enforce his right to recover it against the occupier otherwise than by proceedings in the court.

Then in s 7(3) of the same Act it says:

> In subsection (2) 'occupier' means any person lawfully in occupation of the property or part thereof at the termination of the tenancy.

[29] There are numerous authorities, *Nur-lslam Wordwide Industries Sdn Bhd v Yee Kok Sum* [2001] 7 CLJ 494; *Dr Harjit Singh v Suhaimi bin Samat & Anor* [1995] 2 AMR 1988; *Er Eng Hong & Anor v New Kim Eng dan tiap-tiap pemegang yang menduduki atas sebahagian tanah yang dikenali sebagai HS(M) 2162 PTD 4403 Mukim Benut, Daerah Pontian* [2000] 1 CLJ 289; *SME Aerospace Sdn Bhd v Steyr Mannlicher (M) Sdn Bhd* [2006] 3 MLJ 462, to say that failure to comply with this mandatory requirement of s 7(2) of the Specific Relief Act 1950 will subject the landlord to reinstate and to compensate the tenant to its original position before the unlawful eviction. Realizing this shortcoming, the first defendant strenuously offered the following reasons to get round s 7(2) Specific Relief Act 1950:

(1) Section 7 (2) of the Specific Relief Act 1950 is not applicable to a tenancy agreement which is void. In this case, the tenancy agreement is void because two conditions precedent were not fulfilled. They were: (a) the approval for the construction of the structures on the said land and; (b) the approval for the business licence to be secured by the plaintiff prior to the commencement of the tenancy. When the tenancy agreement is a contingent agreement dependent on compliance of pre conditions and these pre-conditions were not fulfilled, then the agreement is void under s 33 of the Contracts Act 1950.

A (2) The tenancy agreement is also void under s 24 of the Contracts Act 1950 since the objective of the tenancy was unlawful -unlawful in the sense that the plaintiff was occupying the illegal structures on the said land and conducting its activities therein without licence.

B (3) By not being able to secure the approval from MBI for the structures constructed on the said land and the business licence, the act required to be done under the tenancy agreement became impossible to perform. When an agreement to do an act becomes impossible in itself the agreement is void under s 57(2) Contracts Act 1950.

C **[30]** I think all these arguments of the first defendant are without substance. Firstly, to say that the tenancy agreement is a contingent contract is incomprehensible. A perusal of the tenancy agreement will bear this out. By no stretch of imagination could this tenancy agreement ever be construed as a contingent contract dependent upon certain events to take place. To me, it was simply a tenancy agreement to let out D the said land for a period of time for a consideration. In order to use the said land as a tenant, the plaintiff had in the agreement declared certain covenants to the first defendant as landlord. And the purported conditions precedent, in my view, are actually covenants. These covenants cannot be translated into conditions precedent. They remain as covenants. The tenancy agreement is not dependent on these E covenants to exist nor did it depend on any of the events alleged by the first defendant to be conditions precedent. And if the plaintiff had breached any of the stipulated covenants, the first defendant, as landlord, is entitled under the terms of the tenancy agreement to seek remedy against the plaintiff, such as terminating the tenancy agreement. But this does not make the tenancy agreement void.

F **[31]** The second ground proffered by the first defendant is even more absurd. It makes no logical sense. I could not detect any unlawful objective in this tenancy agreement. As stated, essentially this tenancy agreement is one of tenancy where the first defendant, as landlord, agrees to let to the plaintiff, as tenant, the said land for a certain period at an agreed rent. There is nothing sinister about this.

G

[32] The third argument of the first defendant is again without merit when the objective of the tenancy remains essentially that of letting the said land to the plaintiff for a term at an agreed consideration. This objective did not become impossible or H unlawful to carry out after the tenancy agreement came into existence. To secure the relevant approval for the structures constructed and to use the structures for an intended purpose are not the primary objectives of the contract; the renting of the said land is.

I **[33]** As often repeated, s 7(2) and (3) of the Specific Relief Act 1950 has regulated the remedy of self help into oblivion as the owner of the said land can only seek to enforce his right to recover his property from the occupier, even after the tenancy has terminated, by way of a court action. As the first defendant in this case had not adopted this approach but instead enforced its rights by self help, my answer to the second issue is in the negative.

Third Issue: Should the plaintiff be entitled to the reliefs sought against the first defendant

[34] Based on my analysis of the first and second issues, it is obvious that the plaintiffs claim against the first defendant is based on the cause of action of trespass on the said land by non-compliance of s 7(2) of the Specific Relief Act 1950. Its claim for breach of contract is rejected. With this firmly in mind, I shall now proceed to deal with the reliefs claimed by the plaintiff against the first defendant.

[35] The third prayer in the statement of claim is for a declaration that the plaintiff be entitled to a lease or tenancy of the said land for the remaining period of the tenancy with the option to renew from date of re-possession by the first defendant. But there is no specific demand for restoration of possession to the said land due to unlawful eviction by the first defendant. This third prayer only requests for a declaration that the tenancy to the said land still exists for the remaining period and that possession be allowed on this basis. Since I have held that the tenancy was lawfully terminated, possession to the said land based on the existence of a valid tenancy cannot be possible. Possession can only be granted to the plaintiff for unlawful eviction by the first defendant for failing to comply with s 7(1) Specific Relief Act 1950. It is allowed by virtue of s 8(1) and (2) Specific Relief Act 1950 which says:

> 8(1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof notwithstanding any other title that may be set up in the suit.
>
> (2) Nothing in this section shall bar any person from suing to establish his title to any such property and to recover possession thereof.

[36] But the plaintiff did not seek redress for possession of the said land under this provision of the law. So when there is no claim for possession of the land through this means, what is left in the plaintiffs claim is only for damages for trespass.

[37] Since trespass is actionable per se, it is not necessary for the plaintiff to prove actual loss in order to recover damages from the first defendant. However, if actual loss is suffered and proved then the plaintiff should be duly compensated. And this should be for a 'sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation' - McGregor on *Damages* 14th Ed p 7 citing Lord Blackburn in *Livingstone v Rawyardr Coal Co* [1880] 5 App Cas 25. For this, the plaintiff has made the following claims:

(1) cost and expenses involved in the reinstatement of the structures to its original state and condition amounting to a sum ofRMl,219,600;

(2) loss of profit from potential sub-tenants and income from billboard advertising at RM150,000 per month commencing from the date of being dispossessed of the said land till an appropriate date;

(3) loss of net profit in the sum of RM110,000 per month from 28 March 2001 until 15 December 2005 or until 15 December 2003 or such other date as deemed appropriate;

(4) loss of goodwill of business estimated at RM500,000;

(5) exemplary and aggravated damages.

I shall deal with each of these in turn.

Cost of reinstatement

[38] For cost of reinstatement of the structure which is listed as RMl,219,600, I only allow the following which were proved:

(1) RM330,000 for the cost of construction of the structure;

(2) RM106,206 as contribution to the TNB substation. I disallow the claim for RM20,000 which was deposited by the plaintiff with Maybank Bhd which in turn issued a guarantee to TNB. My reason is that this deposit with Maybank can be recovered by the plaintiff from the bank directly;

(3) RM53,049.04 for road works and car parking facilities;

(4) RM28,491.50 for landscape works;

(5) RM9,875 for construction of pond;

(6) RM11,011 for construction of Lily Stock (attap roof);

(7) RM43,364 for sound system, disco lights, TV monitors and speakers;

(8) RM52,202.80 for air curtains and air-conditioners;

(9) RM10,000 for office equipment;

(10) RM70,001 for free standing structure and canopy and steel frame;

(11) RM140,000 for engineering works;

(12) RM11,700 for signboards, advertising, uniform and printing costs;

(13) RM8,800 for cash register;

(14) RM20,000 for extra construction works;

(15) RM14,000 motor for the pond;

(16) RM9,000 for insurance premium;

(17) RM2,248.50 for consultation fee;

(18) RM9,280 for plumbing;

(19) RM10,000 for display items; and

(20) RM5,000 for glassware;

[39] I disallow a claim of RMl00,000 for miscellaneous items since there is no actual proof of such loss. The total amount as allowed under this head is RM944,228.84.

Loss of profit from potential sub-tenants and income from billboard advertising at RM150,000 per month commencing from the date of being dispossessed of the said land until a date deemed appropriate.

[40] I disallow this claim for two reasons. First, the plaintiffs tenancy has been legitimately terminated and it would be unlawful for the plaintiff to proceed to secure sub-tenants and to solicit billboard advertising on the said land. Secondly, there is no evidence to prove that this is the expected amount from this source of income.

Loss of net profit in the sum of RM110,000 per month from 28 March 2001 until 15 December 2005 or until 15 December 2003 or such other date as deemed appropriate.

[41] I refuse this claim for reason that the tenancy to the said land has been legitimately terminated. When it is terminated, the plaintiff should not be continuing with its business. Further, MBI has also issued an order to the plaintiff to stop all activities on the said land following which the plaintiff would not be able to enjoy the expected income arising from the sort of activity.

Loss of goodwill of business estimated at RM500,000

[42] I refuse to entertain this claim for the same reason as stated: with the tenancy legitimately terminated and with the order to stop all activities on the said land, the plaintiff would not be able to enjoy any goodwill arising from the stated nature of business on the said land. Further, the period of operation on the said land by the plaintiff was relatively short to have generated any goodwill.

Exemplary and Aggravated Damages

[43] To succeed in this claim for exemplary and aggravated damages, there must be evidence to show that the first defendant's conduct had been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff, *Rookes v Barnard* [1964] 1 All ER 367, or that the first defendant was motivated by malice, insolence or arrogance or calculated to make a profit at the expense of the plaintiff, *Sime Engineering Sdn Bhd & Anor v Public Bank Bhd* [2004] 7 MLJ 475.

[44] I detected none of these elements in the actions of the first defendant. I do not believe and neither is there any direct evidence adduced by the plaintiff to prove that the first defendant's unlawful and drastic action of tearing down and flattening the structures on the said land without first obtaining a court order to so was motivated by profit at the expense of the plaintiff, or insolence or arrogance. It was more out of fear and impatience. Indeed, the said land was leased out to a third party subsequently but this, in my view, arose out of the ordinary course of business after the plaintiff had been evicted from the land. I found no evidence to suggest that this was planned by the first defendant prior to eviction.

Conclusion

[45] For the third issue, I award a sum of RM944,228.84 to the plaintiff as damages for trespass.

Forth Issue: Did the second defendant induce the first defendant to breach the tenancy agreement?

[46] From the pleadings, the plaintiffs allegation against the second defendant under the cause of action for inducement of breach of contract is based on the conduct of the second defendant in first issuing the cheque of RM3,500 for payment of February 2001's rental and then inducing the first defendant to delay in presenting it for payment which resulted in the tenancy agreement being terminated.

[47] To succeed in an action for inducement of breach of contract, the plaintiff must prove that the first defendant, as a third party to the tenancy agreement, had deliberately interfered in the execution of the agreement which had been concluded between the plaintiff and the first defendant, *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor.* [1984] 2 MLJ 105. Thus the following conditions must be satisfied:

(1) there must be direct or indirect interference with the use of unlawful means; and

(2) the plaintiff must show that the second defendant had knowledge of the relevant contract; and

(3) the second defendant had the intention to interfere with the contract; and

(4) in an action other than quia timet injunction, the plaintiff must show that he has suffered special damages which is over and above nominal damage; and

(5) so far as it is necessary the plaintiff must successfully rebut any defence based on justification, which the second defendant may put forth.

see *Law of Torts in Malaysia*, 2nd Ed by Norchaya Talib at p 417.

[48] Judging from the evidence adduced, I am not inclined to find that the second defendant had directly or indirectly interfered with the use by unlawful means to induce the first defendant to breach the tenancy agreement. As I have stated earlier, it is incumbent upon the plaintiff to ensure that there were sufficient funds in its bank account to meet the payment of the said cheque. Although this cheque was not presented immediately after it was drawn and tendered to the first defendant it was however done within a reasonable time. Though the second defendant was also a director of the first defendant at the material time, nevertheless from the evidence adduced, I could not detect that he had intentionally induced the first defendant to delay in banking in the said cheque. As I have said in the earlier part of this judgment, the time taken to present the plaintiffs said cheque was due largely to the administrative work undertaken by the first defendant's staff. For these reasons, my answer is in the negative to the question posed in this issue.

Fifth Issue: Was there a fiduciary duty owed by the second defendant to the plaintiff and if there was, did the second defendant breach this duty?

[49] In the particulars of the statement of claim, the plaintiff alleged that the second defendant, being a director of the plaintiff in charge of finance, owed a fiduciary duty to the plaintiff to efisure that the plaintiff had sufficient funds in its banking account to meet the payment of the plaintiffs cheque for settlement of February 2001's rental. And since the said cheque was dishonoured, the second defendant is in breach of this fiduciary duty to the plaintiff.

[50] It is clear that the law imposes a duty on a director of a company to act *bona fide* in the interest of the company in the performance of his functions as a director. He must not place himself in a position where his duty to the company and his personal interest or interest of third party, for whom he acts, may conflict, *Chua Boon Chin v JM McCormack & Ors* [1979] 2 MLJ 156 at p 158.

[51] Since the main accusation against the second defendant is that he has knowledge of the plaintiffs bank account and financial health of the company through its bank statements (in so far as these were sent to his office first before being forwarded to the plaintiffs employee) the second defendant should have alerted and informed the plaintiff that there was insufficient funds to meet the payment of the said cheque instead of allowing it to be dishonoured. Though it is not denied that the second defendant was a compulsory signatory of all cheques drawn by the plaintiff and also that he was the first to receive the plaintiffs bank statements, but the question still remains as to whether he was in fact the man in charge of finance and accounts of the plaintiff.

[52] I shall first start with the claim that the second defendant was a compulsory signatory of the plaintiffs cheques. Being a compulsory signatory means that aside from the signature of either one of the other two directors of the plaintiff, the second defendant must sign on the plaintiffs cheques before they can be honoured. Observing this from the outside, this implies that the second defendant had desired to have a hold or final say on the financial affairs of the plaintiff and therefore would have kept tab of the company's daily cash flow of the company. However, when one examines the circumstances of how this compulsory signature requirement came about couple with other facts, a different impression arise.

[53] Apparently, when the second defendant together with Lee Soon Tuan went to open the plaintiffs bank account with Maybank, Ipoh it was discovered that both the plaintiffs other directors, Lee Soon Tuan and Lee Gim Aik, were not preferred persons to operate such banking account. They were, in a sort of way, black listed by the banks to operate a current account. So to overcome this, it was proposed by the said bank that the second defendant be a compulsory signatory of the plaintiffs cheques. It was in this light that the plaintiff, who was not even a shareholder of the plaintiff, came to hold this responsibility.

[54] As to the plaintiffs bank statements, the second defendant has admitted that they were indeed sent to his office. But he testified that he did not look at them. Instead, these were immediately handed over to the plaintiffs employee when he or she came to collect them. The second defendant then proceeded to explain that these documents were sent to his address because the plaintiff did not have an office when it first started. Thus, he assisted by providing a mailing address. The latter is indeed correct for when the plaintiff first commenced business in Ipoh, the plaintiff did not have an office. As for his assertion that he did not look at the bank statement, this has to be judged against the operational set up of the plaintiff.

[55] Aside from Lee Soon Tuan and Lee Gim Aik, who were executive directors of the plaintiff, the plaintiff also had a general manager by the name of Bernard Yeo. He was in charge of the day-to-day operations of the plaintiff and this included 'making payments to creditors' and 'what stock to buy and when to pay'. Bernard Yeo, took instructions from Lee Soon Tuan and Lee Gim Aik, not the second defendant. With Bernard Yeo in charge of what to buy and who to pay and with the bank statements forwarded to his office plus the fact that he reported to the other two directors of the plaintiff, then it is more probable that the person who was in charge of finance with knowledge of how much there was in the kitty was not the second defendant but Bernard Yeo, Lee Soon Tuan and Lee Gim Aik. Similarly, it is also very probable, because of this arrangement, that the second defendant did not have sight of the contents of the bank statements. His office was used primarily as a transit point for the bank statements to pass from the bank to the plaintiff. When the plaintiffs own directors and employee had full knowledge of its own financial status then blame cannot be attributed to the second defendant for breaching a fiduciary duty when there was no such duty in the first place.

[56] So my answer to the first part of the five issues is in the negative. With this answer, the second part becomes academic and irrelevant.

Sixth Issue: if the answer to either issue 4 and 5 is in the positive, would the plaintiff be entitled to the relief sought?

[57] Again, since the answers to issue 4 and 5 above are in the negative, this issue is irrelevant.

Seventh Issue: Is the first defendant entitled to counterclaim the plaintiff?

[58] I believed that the cause of action of the first defendant's counterclaim is for breach of contract. This is gathered from its pleadings particularly in the claim for special damages which can only arise from a term of the tenancy agreement where the plaintiff has to make good the said land upon termination of the tenancy. But was the plaintiff accorded such opportunity to do so? Before anything could be done, the first defendant had jumped the gun and demolished all that was on the said land except, perhaps, the power sub-station. Under such circumstances, I rule that this

counterclaim of the first defendant cannot be sustained since it is tainted with illegality. Accordingly, it should be dismissed.

CONCLUSION

[59] For reasons stated above, I hereby:

(a) dismiss prayers 1, 3, 4, (prayer 4 has become academic since events have overtaken this claim) 6, 8, 9, 10 of the plaintiffs claim;

(b) allow prayer 2;

(c) award a sum of RM944,228.84 as damages against the first defendant with interest thereon at 8% per annum from date of judgment to date of realization;

(d) costs against the first defendant;

(e) dismiss the plaintiffs claim against the second defendant with costs;

(f) dismiss the first defendant's counterclaim with costs.

Order accordingly.

Reported by Loo Lai Mee